

Before the
UNITED STATES COPYRIGHT ROYALTY JUDGES
THE LIBRARY OF CONGRESS
Washington, D.C.

In the Matter of

DETERMINATION OF ROYALTY RATES
FOR DIGITAL PERFORMANCE IN SOUND
RECORDINGS AND EPHEMERAL
RECORDINGS (WEB IV)

Docket No. 14-CRB-0001-WR Received
(2016-2020)

APR 24 2015

Copyright Royalty Board

**iHEARTMEDIA'S EMERGENCY MOTION CHALLENGING SOUNDEXCHANGE'S
ASSERTION OF PRIVILEGE AND ATTEMPT TO CLAWBACK DOCUMENTS**

iHeartMedia, Inc. files this emergency motion in response to SoundExchange's April 22, 2015 notice seeking to clawback on privilege grounds 64 documents that unequivocally establish that the licensees' agreements that SoundExchange's experts have proffered as reliable benchmarks that are untainted by the shadow of the statutory license, were in fact heavily influenced by that shadow. This is not a case where SoundExchange has just recently discovered that it "inadvertently disclosed" privileged material, as the Judges' Protective Order requires, but instead reflects a blatant attempt to misuse the Protective Order to erase from the case documents that SoundExchange now realizes are directly contrary to its expert's testimony. Moreover, with respect to the specific 12 documents addressed here, SoundExchange would not be entitled to protection on privilege grounds even if, contrary to fact, SoundExchange had only recently discovered them and provided a privilege log.

iHeartMedia seeks emergency relief because it plans to use at least some of these purportedly privileged documents with SoundExchange's first witness, Dennis Kooker, of Sony. For example, SoundExchange now claims as privileged statements in a Sony document addressing its [REDACTED]

[REDACTED]¹ Another Sony document that SoundExchange seeks to neuter touts that Sony had [REDACTED]

[REDACTED]² These documents — and the others at issue in this motion — are directly relevant to the question of the labels’ “potential use of a license agreement as evidence in a rate proceeding” and any “value to” the labels “unrelated to the *quid pro quo* bargaining.”³ Not only have the Judges recognized the importance of this question, but also SoundExchange’s expert witness has put these facts in issue through his testimony. And, in all events, the mere mention of the CRB and rate-setting proceedings in a business document does not automatically permit the invocation of privilege — to the contrary, the shadow of the CRB is just one of many real-world business constraints that the record-industry deals with day to day.

BACKGROUND

On April 21, 2015, iHeartMedia filed amended written rebuttal testimony from Professor Daniel Fischel and Professor Douglas Lichtman to respond to the “corrected” written rebuttal testimony of Professor Daniel Rubinfeld. Professor Rubinfeld sought to introduce as benchmarks agreements with Apple and other services (the so-called III.E services) that he claimed were “immune” from critiques applicable to interactive benchmarks and “more meaningful than any of the non-interactive license benchmarks proposed by the Services.”

¹ SNDEX0210969, at SNDEX0210971-72 (Ex. 3). The exhibits to this motion contain the documents as originally produced by SoundExchange, with the portions that SoundExchange now seeks to redact on privilege grounds identified with a red box surrounding the text.

² SNDEX0259978, at SNDEX0259980 (Ex. 8).

³ Order Granting in Part Licensee Services’ Motion for Expedited Issuance of Subpoenas at 2 n.5, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 23, 2015); Order Granting in Part and Denying in Part Motion To Compel SoundExchange at 3, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 22, 2015).

Rubinfeld CWRT App. 2 ¶ 8 (emphasis in original). Professor Rubinfeld claimed that these agreements were superior benchmarks because they “were not contemplated to be the centerpiece of either party’s case in the CRB” and “may well be less in the shadow of the statutory proceeding then [sic] the ones created and proposed by the Services.” *Id.*

Using the labels’ own documents, Professor Fischel and Professor Lichtman demonstrated that Professor Rubinfeld’s claim was false. For example, they quoted a document from a Sony executive, who noted, in the context of Sony’s negotiations with MOG (now Beats),

[REDACTED]
[REDACTED]
Fischel/Lichtman Supp. WRT ¶ 21 n.44 (quoting SNDEX0338698-700, at 0338698). In another Sony document regarding its agreement with Apple, Sony stated that it was [REDACTED]

[REDACTED] *Id.* ¶ 26 (quoting SNDEX0259978-034, at 0259980). Similarly, Universal, in the context of its potential agreement with Apple, recognized that, if it [REDACTED]

[REDACTED] *Id.*
¶ 25 (quoting SNDEX0426042-049, at SNDEX0426048).

The very next day — April 22 — SoundExchange notified iHeartMedia and the other participants that it had “inadvertently” produced 64 documents that it now claimed were privileged, in whole or in part, and sought to claw back the privileged materials pursuant to the Judges’ Protective Order. *See* SoundExchange Notice (Ex. 13). Yet there was nothing inadvertent about this discovery. iHeartMedia and the other Services had cited — and quoted from — some of these very documents in moving for a subpoena to Apple. *See, e.g.,* Services Mot. for Subpoena to Apple at 7-8 & Exs. 6 & 22, Docket No. 14-CRB-0001-WR (2016-2020)

(Mar. 30, 2015) (quoting, for example, a Sony document stating its desire to [REDACTED]

[REDACTED]). These documents were also used at the deposition of Professor Rubinfeld held in April, without objection. *See, e.g.*, Rubinfeld Depo. Tr. at 833-37 & Ex. 13 [REDACTED]

[REDACTED].⁴ Two of the documents attached to this motion (Exhibits 3 and 5) were included on Pandora's exhibit list (as Exhibits 5154 and 5159); SoundExchange raised objections to only the first of those documents, but did not raise privilege objections.

The overwhelming majority of the 64 documents are internal business presentations retrieved from the files of businesspeople, evaluating financial assumptions, costs, and benefits of potential licensing agreements with Apple and other services. The rest of the documents are e-mail communications containing similar business analysis. Notably, three of the documents⁵ already contained privilege redactions that SoundExchange had previously applied, showing that SoundExchange had reviewed these documents for privilege weeks or months earlier but concluded that the portions addressing the implications of direct agreements on the CRB proceeding were *not* privileged. One of the documents (SNDEX0126881) was even listed on SoundExchange's exhibit list. We focus here on the following 12 documents:

- SNDEX0126901 (Ex. 1): [REDACTED]

⁴ Another document, attached as Exhibit 8 to this motion, was also used during Professor Rubinfeld's deposition without objection. *See* Rubinfeld Depo. Tr. at 843-47 & Ex. 15.

⁵ *See* SNDEX0259977, SNDEX0259973, SNDEX0260444.

- SNDEX0185572 (Ex. 2): [REDACTED]
- SNDEX0210969 (Ex. 3): [REDACTED]
- SNDEX0252015 (Ex. 4): [REDACTED]
- SNDEX0259841 (Ex. 5): [REDACTED]
- SNDEX0259933 (Ex. 6): [REDACTED]
- SNDEX0259973 (Ex. 7): [REDACTED]
- SNDEX0259978 (Ex. 8): [REDACTED]
- SNDEX0264910 (Ex. 9): [REDACTED]
- SNDEX0424995 (Ex. 10): [REDACTED]

- [REDACTED]
- SNDEX0426042 (Ex. 11): [REDACTED]

- SNDEX0426141 (Ex. 12): [REDACTED]

I. SOUNDEXCHANGE CANNOT CARRY ITS BURDEN OF JUSTIFYING ITS BELATED PRIVILEGE CLAIMS

SoundExchange bears the burden of supporting its privilege claims. *See, e.g., In re Lindsey*, 158 F.3d 1263, 1270 (D.C. Cir. 1998) (“It is settled law that the party claiming the privilege bears the burden of proving that the communications are protected.”). A “blanket assertion of the privilege will not suffice,” but rather “the proponent must conclusively prove each element of the privilege.” *Id.* (internal quotation marks omitted). The Judges have previously acknowledged the core principle that “[t]he attorney-client privilege only protects the disclosure of communications seeking or rendering legal advice.”⁶ The Judges have therefore drawn a sharp line between privileged “legal advice or strategy” and non-privileged “business deliberations and determinations.”⁷ In particular, the Judges have held that “business determinations are not converted into legal strategy or advice simply because they are made in the overall context of a statutory licensing scheme.”⁸

⁶ *See* Order Denying in Part and Granting in Part SoundExchange’s Mot. to Reconsider at 2, Docket No. 2005-1 CRB DTRA (Mar. 15, 2006) (“*DTRA Order*”).

⁷ *Id.*

⁸ *Id.* at 3.

SoundExchange cannot satisfy its burden to “conclusively prove” that the material it seeks to clawback is privileged. For example, one document is a Sony Music slide deck entitled [REDACTED] SNDEX 0210969 (Ex. 3). SoundExchange is now claiming as privileged a slide that notes that the [REDACTED]

[REDACTED] *Id.* at 974. SoundExchange also seeks to delete from slides Sony’s identification of this opportunity — [REDACTED] — and this “[g]oal[] and [c]hallenge[]” — [REDACTED] [REDACTED] *Id.* at 971-72.

Another document — versions of which account for 28 of the 64 documents SoundExchange now seeks to redact — is a Universal slide deck entitled [REDACTED] SNDEX0426041, at 042 (Ex. 11). SoundExchange now claims as privileged a slide that identifies, under the heading, [REDACTED]

[REDACTED] *Id.* at 048. SoundExchange also claims as privileged two of the [REDACTED] — although it makes no such claim as to any of the [REDACTED] — including that Universal [REDACTED] [REDACTED] *Id.* at 049.

On their face, none of these statements contains legal advice or reflects attorney work product. Instead, they clearly reflect business deliberations going to the value of these direct licenses. The same is true of the statements in the other 10 documents at issue in this motion, as set forth in the list above. SoundExchange simply cannot carry its heavy burden of substantiating its privilege claims.

II. SOUNDEXCHANGE CANNOT USE PRIVILEGE CLAIMS TO HIDE FACTS THAT REFUTE ITS EXPERT'S CLAIMS

Aside from the underlying substance of SoundExchange's privilege claim, SoundExchange's expert has affirmatively claimed that the Apple agreements are "more meaningful than any of the non-interactive license benchmarks proposed by the Services," because they purportedly "were not contemplated to be the centerpiece of either party's case in the CRB" and "may well be less in the shadow of the statutory proceeding." Rubinfeld Corrected WRT ¶ 8. Having put this question directly in issue, iHeartMedia and the other Services are entitled to facts that disprove Professor Rubinfeld's claim, even if those facts were contained in privileged documents.⁹

That is because "the privilege may implicitly be waived when [a party] asserts a claim that in fairness requires examination of protected communications." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir. 1991). Here, SoundExchange cannot have its expert proffer a factual assertion about the expectations of the parties to the Apple and Section III.E agreements and then rely on (belated) privilege claims to hide from the Services and the Judges documents that directly contradict that factual assertion. SoundExchange has therefore waived any privilege claims as to these documents that it might otherwise have. *See John Doe Co. v. United States*, 350 F.3d 299, 302 (2d Cir. 2003) ("It is well established doctrine that in certain circumstances a party's assertion of factual claims can, out of considerations of fairness to the party's adversary, result in the involuntary forfeiture of privileges for matters pertinent to the claims asserted."). Finding waiver is also consistent with the Judges' recognized "need for a comprehensive record," "in which the parties' admissible facts and expert opinions, and their pertinent

⁹ Indeed, even where these facts are contained in privileged communications, the privilege "does not protect against the disclosure of the underlying facts." *DTRA Order at 2*.

arguments” — including “*opposing analysis of th[e] benchmarks*” the parties’ propose — are all presented to the Judges as fully as possible.¹⁰

III. SOUNDEXCHANGE WAIVED THROUGH DELAY ANY PRIVILEGE CLAIMS IT HAS AS TO THESE DOCUMENTS

In all events, as shown above, iHeartMedia and the other Services used some of the documents at issue on March 30 in moving for the issuance of a subpoena to Apple and on April 14 at Professor Rubinfeld’s deposition, and SoundExchange itself had previously made privilege redactions as to others. Under the terms of the Protective Order, a party may seek to clawback privileged documents “*not later than five (5) business days after discovery of the inadvertent production or filing of such material.*” Protective Order at 5 (emphasis added).

SoundExchange’s April 22 notice is outside that period, rendering its clawback notice improper.

Although SoundExchange claims that it “became aware of the inadvertent production “between April 19-21, 2015,” Notice at 1, that claim — if true — simply reflects a lack of diligence given the prominence of the documents in the motion regarding the Apple subpoena and their use in the Rubinfeld deposition. But the claim itself is implausible, at best.

SoundExchange notably does not state which documents it allegedly concluded were inadvertently produced on which day, why it took three days to discover them all, and why it only waited until *after* the Services’ supplemental rebuttal testimony was due before raising its claims as to the documents it supposedly concluded on April 19 or 20 were inadvertently produced.

¹⁰ Order Denying Motion to Strike and Granting Other Relief at 8, Docket No. 14-CRB-0001-WR (2016-2020) (Apr. 2, 2015) (“Order Denying Motion to Strike”).

CONCLUSION

For the foregoing reasons, the Judges should reject SoundExchange's belated claims of privilege as to the 12 documents attached to this motion and permit the Services to use those documents in this proceeding.

Dated: April 24, 2015

Respectfully submitted,

iHEARTMEDIA, INC.

/s/ John Thorne

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PUBLIC

Exhibits 1-13

Exhibits Redacted In Their Entirety

CERTIFICATE OF SERVICE

I, Evan T. Leo, hereby certify that a copy of the foregoing PUBLIC version of iHeartMedia's Emergency Motion Challenging SoundExchange's Assertion of Privilege and Attempt To Clawback Documents has been served on this 24th day of April 2015 on the following persons:

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Declaration of
Evan T Leo



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DETERMINATION OF ROYALTY RATES) Docket No. 14-CRB-0001-WR
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RECORDINGS AND EPHEMERAL)
RECORDINGS (WEB IV))
_____)

DECLARATION AND CERTIFICATION OF EVAN T. LEO
ON BEHALF OF iHEARTMEDIA, INC.

1. I am one of the counsel for iHeartMedia, Inc. (“iHeartMedia”) in this proceeding, and I submit this Declaration in support of the restricted version of version of iHeartMedia’s Emergency Motion Challenging SoundExchange’s Assertion of Privilege and Attempt To Clawback Documents.

2. On October 10, 2014, the CRB adopted a Protective Order that limits the disclosure of materials and information marked “RESTRICTED” to outside counsel of record in this proceeding and certain other parties described in subsection IV.B of the Protective Order. *See* Protective Order (Oct. 10, 2014). The Protective Order defines “confidential” information that may be labeled as “RESTRICTED” as “information that is commercial or financial information that the Producing Party has reasonably determined in good faith would, if disclosed, either competitively disadvantage the Producing Party, provide a competitive advantage to another party or entity, or interfere with the ability of the Producing Party to obtain like information in the future.” *Id.* The Protective Order further requires that any party producing such confidential information must “deliver with all Restricted materials an affidavit

or declaration . . . listing a description of all materials marked with the 'Restricted' stamp and the basis for the designation." *Id.*

3. I submit this declaration describing the materials iHeartMedia has designated "RESTRICTED" and the basis for those designations, in compliance with Sections IV.A of the Protective Order. I have determined to the best of my knowledge, information and belief that the materials described below, which are being produced to outside counsel of record in this proceeding, contain confidential information.

4. The confidential information comprises or relates to information designated RESTRICTED by other participants in this proceeding. iHeartMedia has designated such information as RESTRICTED to maintain its confidentiality in accordance with the Protective Order's command to "guard and maintain the confidentiality of all Restricted materials." Protective Order at 2.

Pursuant to 28 U.S.C. § 1746 and 37 C.F.R. § 350.4(e)(1), I hereby declare under the penalty of perjury that the foregoing is true and correct.

April 24, 2014

Respectfully submitted,

/s/ Evan T. Leo

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Redaction Log



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RECORDINGS AND EPHEMERAL
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Docket No. 14-CRB-0001-WR
(2016-2020)

**REDACTION LOG FOR iHEARTMEDIA'S EMERGENCY MOTION
CHALLENGING SOUNDEXCHANGE'S ASSERTION OF PRIVILEGE AND
ATTEMPT TO CLAWBACK DOCUMENTS**

iHeartMedia hereby submits the following list of redactions from the restricted version of iHeartMedia's Emergency Motion Challenging SoundExchange's Assertion of Privilege and Attempt To Clawback Documents filed April 24, 2015, and the undersigned certifies, in compliance with 37 C.F.R. § 350.4(e)(1), and based on the Declaration of Evan T. Leo submitted herewith, that the listed redacted materials are properly designated confidential and "RESTRICTED."

Document	Page/Paragraph/ Line	General Description
iHeartMedia's Emergency Motion Challenging SoundExchange's Assertion of Privilege and Attempt to Clawback Documents	pp. 1-2, para. 2, lines 4-5 & 6-7	Contains information designated as restricted by other participants.
	p. 3, para. 1, lines 4-5, 7-8, & 10-11	Contains information designated as restricted by other participants.
	pp. 3-4, para. 2, lines 8-10 & 11-13	Contains information designated as restricted by other participants.

Document	Page/Paragraph/ Line	General Description
	pp. 4-6, para. 1, lines 10-12, 13-16, 17-20, 21-25, 26-28, 29-33, 34-38, 39-42, 43-47, 48-52, 53-56, 57-61	Contains information designated as restricted by other participants.
	p. 7, para. 1, lines 3, 4-6, 7, & 8-9	Contains information designated as restricted by other participants.
	p. 7, para. 2, lines 2-3, 4-6, 7 & 8-9	Contains information designated as restricted by other participants.

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